Supreme Court, U.S.
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No. 99 813

In The

Supreme Court of the United States

RUDOLPH SANTOBELLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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31 pp

QUESTION PRESENTED

1.

Because the guilty pleas of co-defendants were introduced as evidence against petitioner at trial, despite a plea bargain contract by the Government not to do so, was petitioner denied Due Process of Law; and does petitioner have standing as an aggrieved party to contest the use of the guilty pleas?

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OPINION BELOW

The Order of the United States Court of Appeals for the Second Circuit, dated June 22, 1999, is submitted herewith as *Appendix "A"*.

JURISDICTION

This matter is On Writ of Certiorari to the United States Court of Appeals for the Second Circuit. The Order of that Court, denying petitioner a certificate of appealability, was entered June 22, 1999.

The statutory provision conferring upon this Court jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari is 28 U.S.C.A. § 1254.

CONSTITUTIONAL & STATUTORY PROVISIONS

1. Petitioner was denied Due Process of Law pursuant to the dictates of the Fifth Amendment to the United States Constitution which states in relevant part:

> "No person shall be held to answer. . . . . , nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Initially, a judgment of criminal conviction was entered against petitioner in the United States District Court for the Southern District of New York (Hon. Robert Patterson), on March 27, 1995, finding him guilty after trial of RICO Conspiracies and other assorted crimes, and his sentence of 78 months incarceration, a 3 year Supervised Release Term, a fine of $50,000, and a Special Assessment of $500.

On June 2, 1997, after the direct appeal process, petitioner filed a motion pursuant to 28 USC § 2255 to seeking to vacate his sentence.

By Opinion and Order dated March 12, 1998, the District Court denied petitioner's application for relief. Petitioner then filed a motion in the United States Court of Appeals for the Second Circuit seeking a certificate of appealability.

On June 22, 1999, the United States Court of Appeals for the Second Circuit denied petitioner's motion for a certificate of appealability.

REASON FOR GRANTING THE WRIT

Reason: As an aggrieved party petitioner has the right to challenge the misuse by the Government of the guilty pleas of co-defendants, and said use by the Government was newly discovered.

Petitioner's application for relief pursuant to 28 U.S.C. § 2255 was based on grounds alleging constitutional error which had been newly discovered, and the

discovery of new evidence. *Hill v. United States*, 368 U.S. 424, 428 (1962). Petitioner alleged that the Government's improper use of co-defendants Cilenti and Sarcinella's guilty pleas could be re-litigated in the Motion, even though raised as an issue on direct appeal, because of newly discovered evidence concerning those pleas. For the District Court to have found at page 7 of its Opinion that petitioner should have known before trial of the guilty plea promises made by the Government to the co-defendants is unrealistic. The finding by the District Court does not make sense either legally or otherwise:

> "Petitioner cannot meet this test because, if the alleged agreements had been reached, their terms were such that they would have had to have been made at Santobello's request or for his benefit, and would have been disclosed to him or his counsel."

Petitioner did not know of the promises made by the Government to Sarcinella and Cilenti, and there is no evidence to the contrary. Further, there is no authority anywhere that petitioner, as an aggrieved party, cannot challenge the Government's misuse of the guilty pleas of the co-defendants at petitioner's trial.

The newly discovered evidence submitted by petitioner is as follows:

On April 8, 1997, Daniel Cilenti signed an affidavit stating his guilty plea was made pursuant to a specific understanding and agreement with the Government that Cilenti's guilty plea to a generic association in fact, made September 13, 1994, would not be used by the Government as evidence against defendant Santobello at the latter's trial.

On April 8, 1997, Jonathan Jacobs, Esq., signed an affidavit stating that as attorney for defendant Cilenti, defendant Cilenti's guilty plea to a generic association in fact was made pursuant to a specific understanding and agreement with the Government that Cilenti's guilty plea made September 13, 1994, would not be used by the Government as evidence against defendant Santobello at the latter's trial.

On April 11, 1997, defendant Joseph Sarcinella signed an affidavit stating his guilty plea under Counts Eight and Ten of the Indictment was to generic enterprises and charges not contained in the Indictment, but to a generic association in fact with unnamed others, pursuant to a plea agreement with the Government. Further, the guilty plea was entered pursuant to a specific agreement with the Government that the Government could not use Sarcinella's guilty plea as evidence against defendant Santobello at his trial.

On April 11, 1997, Murray Richman, Esq., attorney for defendant Joseph Sarcinella signed an affidavit stating Sarcinella's guilty plea under Counts Eight and Ten of the Indictment was to generic enterprises and charges not contained in the Indictment, but to a generic association in fact with unnamed others, as per a plea agreement with the Government. Further, the guilty plea was entered pursuant to a specific agreement with the Government that the Government could not use the Sarcinella's guilty plea as evidence against defendant Santobello at his trial.

The Indictment in Count One charged petitioner, Daniel Cilenti and Charles DeSalvo with a RICO Conspiracy in violation of 18 USC, section 1961. Racketeering Act

One [paragraph "10" of the Indictment] involved a Conspiracy to Make Extortionate Extensions of Credit, Conspiracy to Collect Extortionate Extensions of Credit, and Financing Extortionate Extensions of Credit. Racketeering Act Two [paragraph "11" of the Indictment] charged the operation of an illegal gambling business, the crap game at 2500 Arthur Avenue. Racketeering Act Three [paragraph "12" of the Indictment] charged the operation of illegal bookmaking establishments at 2405 Southern Boulevard, and 632 East 186th Street. Racketeering Act Four [paragraph "13" of the Indictment] charged the illegal operation of a bookmaking business at 844 Morris Park Avenue. Racketeering Act Five [paragraph "14" of the Indictment] charged an illegal numbers operation at Club Arthur.

Count Two of the Indictment charged petitioner with Racketeering in violation of Title 18, United States Code, Section 1962(c). Count Two incorporated by reference paragraphs 1 – 7, and 9 – 14, of the RICO Conspiracy set forth in Count One.

Count Three of the Indictment charged petitioner and Daniel Cilenti with a Collection of Unlawful Debts Conspiracy involving usurious loan to Richard Garibian, and to "victim" #1, in violation of Title 18 USC, section 1962(d).

Count Four charged petitioner and Daniel Cilenti with a Conspiracy to Make Extortionate Extensions of Credit in violation of Title 18 USC, sections 891 & 892.

Count Five charged petitioner and Daniel Cilenti with a Conspiracy to Collect Extensions of Credit by

Extortionate Means in violation of Title 18 USC sections 891 & 894.

Count Six charged petitioner and Daniel Cilenti with Financing Extortionate Extensions of Credit in violation of Title 18 USC sections 891, 893 & 2.

Count Seven charged petitioner and Daniel Cilenti with Use of Extortionate Means to Collect an Extension Credit in violation of Title 18 United States Code, sections 891, 894 & 2.

Count Eight charged petitioner, Charles DeSalvo, Benjamin Castellazzo, Vito Raguso, Joseph Sarcinella and Joseph Silvestri with a Gambling Conspiracy in violation of Title 18 USC section 371.

Count Nine charged petitioner and Charles DeSalvo and Benjamin Castellazzo with running an illegal craps game at 2500 Arthur Avenue in violation of Title 18 USC sections 1955 & 2.

Count Ten charged petitioner, Joseph Sarcinella and Joseph Silvestri with running bookmaking operations at 2405 Southern Boulevard, and 632 East 186 Street, in violation of Title 18 USC sections 1955 & 2.

Count Eleven charged petitioner, Charles DeSalvo and Vito Raguso with running a bookmaking operation at 844 Morris Park Avenue, in violation of Title 18 USC sections 1955 & 2.

Count Twelve charged petitioner and others known and unknown with running an illegal numbers operation headquartered at 2343 Arthur Avenue in violation Title 18 USC, sections 1955 & 2.

On September 13, 1994, Daniel Cilenti plead guilty under amended Counts Three, Four, Five, Six and Seven of a Superseding Indictment. Count Three charged Unlawful Debts Conspiracy; Count Four charged Conspiracy to make Extortionate Extensions of Credit; Count Five charged a Conspiracy to Collect Extensions of Credit by Extortionate Means; Count Six charged Financing Extortionate Extensions of Credit; and Count Seven charged the Use of Extortion to Collect Credit. Co-defendant Cilenti specifically refused to plead to the enterprise charged in that Indictment. Mr. Cilenti then read into the record his plea allocution to an amended version of Count Three, and specifically stated:

> THE DEFENDANT: "I specifically declined to name any other individuals, nor this ple – nor does this plea acknowledge the role of any specific individual. My plea of guilty to conspiring with an association in fact is not an admission of my membership in any organized crime family."

The Indictment specifically charged the Genovese Crime Family as the RICO enterprise. The Indictment did not charge any generic association in fact. Mr. Cilenti plead guilty to some association in fact with unnamed others, not the enterprise repeatedly charged in the Indictment. Defendant Cilenti's plea allocution as to Count Three was incorporated in his guilty plea as to Counts Four, Five, Six and Seven. The Government, and the Court accepted Cilenti's guilty plea pursuant to that limited proffer. Cilenti's particular guilty plea was a contract entered into by the Government with its eyes open, and to its satisfaction.

On September 16, 1994, Joseph Sarcinella plead guilty to generic offenses named in Counts Eight and Ten of the Indictment. Count Eight charged a Gambling Conspiracy, and Count Ten charged Bookmaking. The Court advised Sarcinella that he had a right to counsel in the criminal proceeding. Then, with regard to Count Eight, and while standing beside Sarcinella in open Court, Sarcinella's attorney advised the Court as follows regarding Sarcinella's guilty plea:

> "MR. RICHMAN: Respectfully, your Honor, my client was part of the conspiracy, but not with Mr. Santobello or with Mr. Raguso or Mr. Disanto or Mr. Castellazzo or Mr. Petrenicola. We do not say anything concerning Mr. Silvestri because –"

In response to Mr. Richman's statement of limitation, the Court then advised Mr. Sarcinella with regard to Count Eight:

> "Now for the purposes of this plea, the essential elements of the crime against you are that you entered into a conspiracy with other persons, and second, that the object of that conspiracy was to conduct an illegal gambling business . . . "

Thereafter, Sarcinella entered his guilty plea under the amended Count Eight to being a member of a generic illegal gambling conspiracy, but not to the specifically delineated conspiracy in petitioner's Indictment. That amended plea was accepted by, and adopted by the Government and the Court.

Prior to Sarcinella's guilty plea to Count Ten [Bookmaking], and while standing beside Sarcinella before the

Court, Sarcinella's attorney advised the Court as follows regarding Sarcinella's guilty plea, and the Court and Sarcinella responded:

> "MR. RICHMAN: Your Honor, my client wishes specifically to state that Mr. Santobello had nothing to do with the operation, but that he is pleading guilty without Mr. Santobello's involvement.
>
> THE COURT: Well, all right, I understand, but how does he plead to the charge?
>
> THE DEFENDANT: Guilty."

Over vigorous and repeated defense objections at trial the Court permitted the Government to read to the jury redacted versions of the Cilenti and Sarcinella guilty pleas. Both Sarcinella and Cilenti had previously appeared with counsel at petitioner's trial and indicated to the trial judge that because they had not been sentenced, if called to testify by the petitioner, both Sarcinella and Cilenti would exercise their Fifth Amendment right and refuse to testify. Based on said representations the trial Court excused Sarcinella and Cilenti, and petitioner's trial resumed without access to their testimony. Both Sarcinella and Cilenti, and their respective counsel refused to discuss any aspect of their pleas, or the facts and circumstances of their "plea bargain arrangements" with petitioner or petitioner's counsel, citing Fifth Amendment privilege. However, both Sarcinella and Cilenti have now been sentenced, their testimony is no longer protected by Fifth Amendment privilege, and their affidavits, and the affidavits of their attorneys Richman and Jacobs are attached as exhibits to the instant motion.

At petitioner's trial the jury was never advised that defendants Cilenti and Sarcinella specifically and deliberately did not plead guilty to the specific charges contained in the Indictment against Santobello, but only plead guilty to having committed the same type offenses in an unrelated generic way. The Government's cut and paste job on the guilty plea transcripts was deliberately misleading, and intended to hide from the jury that the specific enterprises, conspiracies and conduct of illegal gambling involving 5 or more persons, charged in the Indictment for which Santobello and others were then on trial, were not the same enterprises, conspiracies and illegal gambling businesses which formed the basis of Cilenti's and Sarcinella's incriminating statements made in the course of their guilty pleas.

After the Government prosecutor read in contravention of the Government's plea agreements with Cilenti and Sarcinella, said redacted guilty pleas to the jury, the Court instructed the jury that it could consider the guilty pleas as follows:

> "You may consider the statements by Mr. Cilenti and Mr. Sarcinella in determining whether there was an enterprise or association in fact; and B, whether there were conspiracies or agreements to collect unlawful debts, to make or collect unlawful extensions of credit, and to conduct illegal gambling businesses. . . .
>
> Again, statements of Mr. Cilenti and Mr. Sarcinella may only be considered by your as evidence of the existence of the enterprise or association in fact, or the existence of the conspiracies I have described. You are instructed

> that you are to draw no conclusions or inferences of any kind about the guilt of any defendant from the fact that these persons have made these statements. But you may use these statements as evidence that a conspiracy or an enterprise existed."

The Court's charge at the conclusion of summations also instructed the jury that the redacted guilty pleas could be used as evidence to prove the existence of the conspiracies, enterprises and illegal gambling businesses specifically charged in the Indictment, but the jury could not use them as evidence to prove membership of any defendant on trial in those conspiracies, enterprises and illegal gambling businesses.

Despite the Court's knowledge that Sarcinella and Cilenti had plead guilty expressly acknowledging that they were not admitting criminal conduct specifically charged in the Indictment, but to different criminal activity, the Court suppressed those portions of their guilty pleas that would prove a petitioner's defense at trial. Once the Court decided to permit the Government to introduce the guilty plea transcripts of Sarcinella and Cilenti, petitioner alternately and unsuccessfully requested the entire guilty plea transcripts be read to the jury to give the jury an accurate picture of just what those defendants had admitted.

The guilty pleas of Cilenti and Sarcinella were both entered in open Court, with the same Government prosecutor and defense counsel present that entered into the respective plea bargain agreements, and in both instances the defendants were placed under oath under penalty of perjury to tell the whole truth.

The Court charged the jury that it had to find beyond a reasonable doubt the existence of the specific conspiracies, enterprise and illegal gambling business set forth in the Indictment, as a factual predicate before the jury could even consider the other elements of the crimes charged in each count of the Indictment. The admission of the redacted Cilenti and Sarcinella guilty plea transcripts was used as evidence of the elements of the specific conspiracies, enterprises and gambling businesses charged in the Indictment.

A plea bargain is interpreted according to the principles of contract law, and the Government accepted the guilty pleas of Sarcinella and Cilenti under very particular circumstances. See, *Santobello v. New York*, 404 U.S. 257 (1971). The affidavits are newly discovered evidence. It cannot be more clearly stated than was done by Cilenti's attorney Jacobs when he appeared at petitioner's trial to inform the Court that Cilenti would exercise his Fifth Amendment privilege if called by petitioner:

> ". . . . It had been my indication from Cilenti at all times that, with respect to the government's subpoena, which is what we are here for, that he would invoke his Fifth Amendment privilege. And, in fact, I think we had been quite clear to the government, and when we took a plea several weeks before your Honor, that Mr. Cilenti, in his allocution made it quite clear that he was not in any way implicating anybody, or stating anybody did anything. And that obviously included Mr. Santobello.
>
> That in no way was his allocution to be an admission that anybody did anything in this case.

> And we took the plea under those circumstances, as well as denying the enterprise as charged.
>
> And Mr. Cilenti, with the government's permission, and your Honor's permission, pled to an association in fact.
>
> Mr. Cilenti would now affirm that he's reviewed the matter with me, and to any and all questions on behalf of the government's subpoena he would invoke the Fifth Amendment privilege."

The trial Judge then responded:

"THE COURT: Your recital of what went on coincides with my recital of what went on at the plea allocution, Mr. Jacobs."

Five minutes after the jury retired to deliberate, the first of many notes they sent to the Court was a request for copies of the Sarcinella and Cilenti guilty pleas to review during deliberations. petitioner's trial, and those jury deliberations must now be viewed in the light of the newly discovered evidence. The Cilenti and Jacobs affidavits state that as part of Cilenti's plea bargain agreement with the Government, the Government promised Cilenti that that guilty plea would not, and could not be used against Santobello at his trial. The Sarcinella and Richman affidavits state that as part of Sarcinella's plea bargain agreement with the Government, the Government promised Sarcinella that his guilty plea would not, and could not be used against Santobello at his trial.

The evidence contained in each affidavit was not available to petitioner at his trial, or at the time of direct

appeal, because each deponent was protected by their Fifth Amendment privilege, and the attorney/client privilege, respectively. It is now newly discovered evidence.

It is axiomatic that an accused's Fifth Amendment right to Due Process of Law, requires that he be treated with fundamental fairness. Instant petitioner was treated fundamentally unfair at trial. All other trial evidence against petitioner was insignificant. Viewed in light of the evidence as a whole, without the Sarcinella and Cilenti guilty pleas the record is barren of other evidence to enable a reasonable factfinder to find the petitioner guilty of the Enterprise and Conspiracies charged.

The Opinion and Order of the District Court dated March 12, 1998, is in error in material respects. The Court was in error to conclude at page "5" of its Opinion that neither Sarcinella nor Cilenti stated that no promises were made to either defendant to induce their guilty pleas. Their above plea allocutions, and the aforesaid post judgment affidavits of the defendants and their attorneys clearly demonstrate that they were promised by the Government that their guilty pleas would not be used as evidence against Santobello at his trial. While said promises were not memorialized in a written plea agreement, the agreement put on the record was clearly part of the plea bargain. If the District Court had any doubt concerning promises made, the Court should have conducted the hearing requested by movant. Additionally, if Sarcinella and Cilenti were not made said promise by the Government, there is no reason why their exculpatory statements concerning Santobello would have been part of the guilty plea record.

There is no authority in the Second Circuit, or elsewhere, to disallow instant movant from seeking to enforce the Government's plea agreements with Sarcinella and Cilenti. Additionally, movant insists he was the victim at trial of the Government's illegally obtained evidence. The Government's use at trial of the illegally obtained plea allocutions was a fundamental defect in the proceedings, particularly because of the paucity of other evidence against appellant concerning the enterprise, and the evidentiary weight the jury obviously gave to the plea allocutions as reflected by the jury note.

An accused's Fifth Amendment right to Due Process of Law requires that he be treated with fundamental fairness. Instant Movant was treated fundamentally unfair at trial. Without the Sarcinella and Cilenti guilty pleas the record is barren of other evidence to enable a reasonable factfinder to find the movant guilty of the Enterprise and Conspiracies charged.

CONCLUSION

For the foregoing reason a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

DATED: September 10, 1999.

Submitted by,

B. Alan Seidler, Esq.
Attorney for Petitioner
127 South Broadway
Nyack, New York 10960
914-358-3860

MANDATE

SDNY/Foley Sq.
97-cv-4404
Patterson

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 22nd day of June, one thousand nine hundred and ninety-nine.

BEFORE: Hon. Roger J. Miner,
Hon. Dennis Jacobs,
Hon. Fred I. Parker,
Circuit Judges.

(Filed June 22, 1999)

SANTOBELLO V. USA

Docket No.
98-2336

Appellant Rudolph Santobello having filed a motion for a certificate of appealability,

Upon consideration thereof, it is

ORDERED that the motion be and it hereby is DENIED.

KAREN GREVE MILTON,
Acting Clerk
by:

/s/ Arthur M. Heller
Arthur M. Heller
Administrative Attorney

–Issued as Mandate: JUN 22 1999–

/s/ Karen Greve Milton
ACTING CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK
----------X
RUDOLPH SANTOBELLO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.
----------X

94 Cr. 119 (RPP)
97 Civ. 4404 (RPP)

OPINION AND ORDER

ROBERT P. PATTERSON, JR., U.S.D.J.

Petitioner Rudolph Santobello ("Santobello") moves to vacate, set aside or correct his sentence pursuant to Title 28, United States Code, Section 2255, on the grounds that the plea allocutions of two of his co-defendants were improperly used against him at his trial, and that the fine imposed and the difference between his sentence and that of a co-defendant are unfair and unjust.

Background

The Genovese Crime Family (the "Family") was an organized criminal enterprise which engaged in loan-sharking and gambling in the New York metropolitan area. According to evidence at trial, petitioner was a "capo" or captain of the Family dating back to at least 1990, and supervised a "crew" of "made members" and associates in the Bronx.

On August 31, 1994, a 13-count indictment was filed with this Court, charging Santobello and eight co-

defendants with various crimes of gaming, bookmaking, and extortionate credit practices in relation to a racketeering enterprise, the Family. Prior to his trial, five of petitioner's co-defendants, including Daniel Cilenti ("Cilenti") and Joseph Sarcinella ("Sarcinella"), pleaded guilty to the charges against them stemming from their involvement with the Family. Petitioner and three other co-defendants made no such plea, and trial commenced against them in this Court on September 26, 1994. At the close of the Government's case, the Court dismissed the charges against two defendants. Trial concluded on October 24, 1994, with the jury convicting Santobello on ten of thirteen counts – counts One through Six, and counts Eight, Nine, Eleven and Twelve.

Count One charged Santobello and a co-defendant with conspiring to conduct and participate in the affairs of a racketeering enterprise – the Genovese Crime Family – in violation of The Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d), and detailed six racketeering acts including loansharking, bookmaking and the operation of numerous gambling parlors. Count Two charged petitioner and a co-defendant with the substantive crime of participating in the conduct of the affairs of the racketeering enterprise in violation of 18 U.S.C. § 1962(c). Count Three charged Santobello and a co-defendant with conspiring to conduct and participate in the affairs of the racketeering enterprise through the collection of payments on two specified unlawful debts in violation of 18 U.S.C. § 1962(d). Counts Four and Five charged him and a co-defendant with conspiring to make extortionate extensions of credit and conspiring to use extortionate means of collection of the extensions of

credit in violation of 18 U.S.C. §§ 892 and 894. Count Six charged Santobello and a co-defendant with financing extortionate extensions of credit in violation of 18 U.S.C. §§ 893 and 2. Count Seven charged Santobello and a co-defendant with using extortionate means to collect extensions of credit in violation of 18 U.S.C. §§ 894 and 2. Count Eight charged Santobello, and seven of his co-defendants, under 18 U.S.C. § 371, with conspiring to conduct the illegal gambling businesses that were charged in the five racketeering acts in Count One. Counts Nine, Ten, Eleven, Twelve, and Thirteen charged Santobello and one or more of his co-defendants with the substantive crime of conducting those illegal gambling businesses in violation of 18 U.S.C. §§ 1955 and 2. (Gov. Mem. at 2-3.)[1]

On March 27, 1995, this Court sentenced Santobello to 78 months' imprisonment and three years' supervised release, ordered payment of a $50,000 fine, and imposed a $500 mandatory special assessment. Santobello then appealed to the United States Court of Appeals for the Second Circuit, and, as a lead-point in his brief, claimed that the guilty plea allocutions of co-defendants Cilenti and Sarcinella were improperly used against him at his trial. (*Id.*, Ex. A).[2] The Court of Appeals rejected all Santobello's claims. (*Id.*, Ex. C).[3]

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[1] "Gov. Mem." refers to the Government's Memorandum of Law in Opposition to Petitioner's § 2255 Motion.

[2] Exhibit A is the Brief for Appellant submitted by Santobello to the Second Circuit on appeal from his sentence.

[3] Exhibit C is the summary order of the Second Circuit Court of Appeals affirming Petitioner's sentence.

Discussion

Petitioner first attempts to set aside his sentence pursuant to 28 U.S.C. § 2255 on the basis of new evidence. Petitioner claims this evidence demonstrates that the plea allocutions of co-defendants Cilenti and Sarcinella were improperly admitted into evidence at his trial.[4] According to petitioner, the Government and each co-defendant entered into a plea agreement prior to the commencement of petitioner's trial, a condition of which was that the plea allocutions of Cilenti and Sarcinella would not be used against petitioner at his trial. (Pet. Mem. at 13).[5] Petitioner further contends that because co-defendant Cilenti declined to name any criminal associates during his allocution and co-defendant Sarcinella exculpated petitioner during his allocution, they allegedly did not plead guilty to the specific charges contained in the indictment against petitioner, and thus their plea allocutions were improperly admitted against Santobello.[6] (*Id.* at 5-9).

Petitioner's new evidence of the alleged plea agreements consists of four affidavits, one from each co-

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[4] Petitioner previously argued that the introduction into evidence of the plea allocutions of Cilenti and Sarcinella was improper under the Federal Rules of Evidence. (Gov. Mem., Ex. A at 14). The Court of Appeals rejected this argument, however. (*Id.*, Ex. C at 4).

[5] "Pet. Mem." refers to the memorandum attached to petitioner's § 2255 motion.

[6] This argument was presented and rejected on appeal. (Gov. Mem., Exs. A and C).

defendant, and one from each of their respective attorneys. (*Id.*, Exs. 1-4). Each affidavit contains one paragraph stating that a condition of the co-defendants' guilty pleas was that they not be admitted at petitioner's trial. (*Id.*, Exs. 1-4 (Cilenti Aff. ¶ 5; Jacobs Aff. ¶ 5; Sarcinella Aff. ¶ 7; Richman Aff. ¶ 7)).

It is well established that "not 'every asserted error of law can be raised on a § 2255 motion.' " *Napoli v. United States*, 32 F.3d 31, 35 (2d Cir. 1994) (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)). Indeed, collateral attack on a final judgment in a criminal case pursuant to § 2255 is only available "for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that constitutes 'a fundamental defect which inherently results in a complete miscarriage of justice.' " *United States v. Bokun*, 73 F.3d 8, 12 (2d Cir. 1995) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)); *see Napoli*, 32 F.3d at 35. Because petitioner asserts no constitutional error or lack of jurisdiction, the Court reviews petitioner's claim as asserting a fundamental defect that led to a miscarriage of justice.

In the context of a § 2255 petition, the Court need not grant a hearing if the files and records of the case demonstrate the petitioner is entitled to no relief or if the petitioner's claims are vague or conclusory. *See United States v. Pollard*, 959 F.2d 1011, 1030-31 (D.C. Cir. 1992) (even if files and records do not clearly rebut prisoner's allegations, no hearing is required where his claims are "vague" or "conclusory"). One problem with petitioner's new evidence is that the affidavits submitted make assertions that flatly contradict what this Court was told during the co-defendants' separate plea allocutions.

> [R]epresentations of the defendant, his lawyer, and the prosecutor at such a hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal. . . .

Blackledge v. Allison, 431 U.S. 63, 73-74 (1977); *see United States v. Farley*, 72 F.3d 158, 163-64 (D.C. Cir. 1995) (quoting *Blackledge*).

During Cilenti's plea allocution, his counsel, Mr. Jacobs, was specifically asked if the plea was being made pursuant to a plea agreement. (Gov. Mem., Ex. D at 4).[7] Cilenti's counsel clearly denied the existence of any such agreement, and assured the Court that the Government could correct him if he were wrong. (*Id.*). The Government concurred, stating "We have no agreement, your Honor." (*Id.*). When asked if anyone had, in any way, made any promises or assurances to him in an effort to induce him to plead guilty, Cilenti himself stated "No, your Honor." (*Id.* at 6).

Similarly, the transcript shows that defendant Sarcinella stated that no promises or assurances had been made to him of any kind in an effort to get him to enter a guilty plea. (Gov. Mem., Ex. E at 4-5).[8] His counsel also

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[7] Exhibit D is the transcript of the Cilenti Plea Proceedings.

[8] Exhibit E is the transcript of the Sarcinella Plea Proceedings.

stated that the plea was not being made pursuant to a plea agreement of any kind.[9] (*Id.* at 2-3).

Federal Rule of Criminal Procedure 11(e)(2) states that "the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered." The Supreme Court has stated that if a plea "was induced by promises, the essence of those promises must in some way be made known" at the time the plea is entered. *Santobello v. New York*, 404 U.S. 257, 261-62 (1971); *see United States v. Farley*, 72 F.3d at 163 (" 'There is no standard short of requiring full disclosure of all material details of plea agreements that can reliably guarantee that guilty pleas are knowing and voluntary and fully understood by the parties.' " (quoting *United States v. Roberts*, 570 F.2d 999, 1007 (D.C. Cir. 1977))). The Court asked Cilenti and Sarcinella if any promise or assurance of any kind had been made in an effort to get these defendants to enter a guilty plea. The defendants answered in the negative and their counsel stood silent. The affidavits attached to petitioner's motion contain no written materials to support their conclusory claims, nor do they cite any specific conversations with any person acting on behalf of the government. No prosecutor is named and no time frame is provided. Thus, no specific facts are alleged that could prove the existence of an agreement at a § 2255

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[9] Both counsel for Cilenti (Gov. Mem., Ex. D at 16-22) and counsel for Sarcinella (*Id.*, Ex. E at 14, 19) clearly limited the pleas of those defendants in ways they felt would not affect the other defendants, particularly Santobello.

hearing. As such, they are insufficient for the Court to order a hearing.

Even if Santobello could establish the existence of plea agreements between the Government and his co-defendants, there is little known authority that would allow him to enforce the agreements as a third party beneficiary. *See United States v. Lopez*, 944 F.2d 33, 36-37 (1st Cir. 1991) (stating that court is unaware of legal authority to allow enforcement of plea agreement by third party beneficiary); *United States v. Bascue*, No. CR 92-169-FR, 1993 WL 513246, at *8-*9 (D.Or. Dec 9, 1993) (refusing to enforce rights of third party beneficiary to plea agreement where agreement had no legal effect between principals). Clearly, the Court was not informed of the alleged plea agreements at the time of the pleas. Thus, it is unlikely that either of the principals could enforce the alleged agreements, and even more unlikely that third-party Santobello can enforce those agreements. *See Lopez*, 944 F.2d at 37 (even if third party beneficiary principles are applicable in plea agreement context, non-party to agreement has no right to performance "under an agreement which was never enforceable between the contracting parties due to the failure of a condition precedent; here, the approval of the district court"); Fed. R. Crim. P. 11(e)(2). Therefore, even if there were a plea agreement of the sort Santobello claims, in this case its breach does not lead to "a fundamental defect which inherently results in a complete miscarriage of justice." *United States v. Bokun*, 73 F.3d at 12 (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)).

Finally, assuming there was an agreement, that it was breached, and that petitioner, as a nonparty, could

enforce it in a § 2255 proceeding, the Second Circuit requires that he show cause for his failure to raise the claim earlier, and prejudice from the errors challenged. *See Campino v. United States*, 968 F.2d 187, 189-90 (2d Cir. 1992). Such cause exists where there is newly discovered evidence "that could not reasonably have been discovered before trial." *United States v. Helmsley*, 985 F.2d 1202, 1206 (2d Cir. 1993). Petitioner cannot meet this test because, if the alleged agreements had been reached, their terms were such that they would have had to have been made at Santobello's request or for his benefit, and would have been disclosed to him or his counsel. Finally, assuming arguendo the sufficiency of petitioner's evidence, and that he or his counsel could not reasonably have discovered the existence of the alleged plea agreement earlier, this Court concludes that there is no prejudice because the Government had ample evidence to sustain petitioner's conviction even absent the use of the plea allocutions of Cilenti and Sarcinella. (Gov. Mem., Ex. B at 5-12).[10]

Petitioner next claims that his fine is unjust because he does not have the resources to pay it. This argument was available to petitioner on direct appeal. It was neither briefed nor considered above. (Gov. Mem., Exs. A and C). Petitioner has the burden of demonstrating cause and prejudice, yet his current motion papers do not even discuss this claim. *See McCleskey v. Zant*, 111 S.Ct. 1454, 1470 (1991); *United States v. Frady*, 456 U.S. 152, 164 (1982) ("[W]e are entitled to presume [defendant] stands fairly

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[10] Exhibit B is the Government's Brief to the Second Circuit on Santobello's direct appeal.

and finally convicted . . . when . . . he already has had a fair opportunity to present his federal claims to a federal forum."); *Douglas v. United States*, 13 F.3d 43, 46 (2d Cir. 1993) (failure to raise a claim "on direct appeal will bar consideration of that claim in a § 2255 motion unless the movant can show that there was cause for failing to raise the issue, and prejudice resulting therefrom"); *see also Campino*, 968 F.2d at 189-190 (failure to raise a claim on direct appeal is a default of the normal appellate procedure which petitioner can overcome only by showing cause and prejudice). Petitioner was certainly aware of his financial circumstances at the time of his appeal, and has shown no cause to excuse his failure to raise this argument at that time. Moreover, Santobello has offered nothing other than a conclusory assertion of indigence to convince the Court that the fine imposed was unjust. Therefore, petitioner has not demonstrated that his sentence should be vacated on this basis.

Petitioner's last argument is that he and his co-defendant, Cilenti, received different sentences for committing the same offense. Absent extraordinary circumstances, there is no right to receive a sentence which reflects one's relative culpability with respect to a co-defendant. *See United States v. Bokun*, 73 F.3d 8, 12 (2d Cir. 1995); *see also United States v. Perez*, 904 F.2d 142, 147 (2d Cir. 1990). There are no circumstances present in the record, and petitioner points to none in his motion, to militate in favor of an equal sentence for Santobello and Cilenti. Santobello pled not guilty and took his chances at trial. He was found to be a "captain" of the racketeering organization. Cilenti pled guilty, thus saving the Court and the People the time and resources of a trial, and also

had a severely retarded daughter completely and solely dependant on him. Moreover, Cilenti was not adjudged guilty of the gambling counts of which Santobello was convicted. These differences support the sentence petitioner received, and undermine his claim that he and Cilenti were "like situated." (Pet. Mem. at 14).

Conclusion

Petitioner's motion under 28 U.S.C. § 2255 is denied in its entirety. Because petitioner has not "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), a certificate of appealability will not be issued. *See* 28 U.S.C.A. § 2253(c)(1), (2) (West Supp. 1997); Fed. R. App. P. 22(b); *Lozada v. United States*, 107 F.3d 1011 (2d Cir. 1997).

IT IS SO ORDERED.

Dated: New York, New York
March 12, 1998

/s/ Robert P. Patterson, Jr.
Robert P. Patterson, Jr.

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